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No. 22

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

VERMILYA-BROWN COMPANY, INC., NECARO COMPANY, INC., AND THE ARTHUR A. JOHNSON CORP., doing business as BERMUDA BASE CONTRACTORS,
Petitioners,

v.

JOHN JOSEPH CONNELL, EUGENE T. FITZPATRICK, WILLIAM L. FLANAGAN, JOSEPH JOHN GILROY, JOHN JOSEPH MORTIMER, JAMES F. McDONALD, PAUL F. NEITER, WILLIAM H. PARKER, JR., LOUIS AUGUST REHBERG, HOWARD L. SHOCK, JR., and DAVID JOSEPH TOWNSEND.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

CHARLES FAHY,
JOSEPH MARKLE,
FRANKLIN NEVIUS,
J. RANDALL CREEL,
PHILIP LEVY,
Attorneys for Petitioners.

EIDLITZ, FRENCH, FINK & MARKLE,
Of counsel.

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OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (R. 59-62) is reported at 73 F. Supp. 860. The opinion of the United States Court of Appeals for the Second Circuit (R. 65-73) is reported at 164 F. 2d 924.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on November 28, 1947 (R. 73). The petition for a writ of certiorari was filed on February 19, 1948, and was granted on March 29, 1948 (R. 75). The jurisdiction of this Court rests upon Section 240(a) of the Judicial Code, as amended.

QUESTION PRESENTED

Whether the naval and air base located in the Crown Colony of Bermuda and held by the United States under lease from the British Government for the purposes specified in the Lease and in the Notes exchanged between the two governments on September 2, 1940, with the rights, powers and authority and on the terms and conditions contained in the Agreement between the two governments signed March 27, 1941, is a "Territory or possession of the United States," with the consequence that the Fair Labor Standard Act of 1938 applies thereto.

STATUTE AND DOCUMENTS INVOLVED

The Fair Labor Standards Act of 1938 (Act of June 25, 1938, 52 Stat. 1060, 29 U. S. C. § 201 *et seq.*) applies, with certain exceptions not here material, to any employee who is "engaged in commerce or in the production of goods for commerce." §§ 6, 7.

Section 3 defines the relevant terms as follows:

> "(b). 'Commerce' means trade, commerce, transportation, transmission or communication among the several States or from any State to any place outside thereof.
>
> "(c). 'State' means any State of the United States or the District of Columbia or any Territory or possession of the United States."

The Exchange of Notes, Lease and Agreement between the United States and His Majesty's Government in the United Kingdom (55 Stat. 1560-1599) are set forth in the printed document separately filed with this brief for the convenience of the Court, entitled *Executive Agreement Series* 235, *Leased Naval and Air Bases, Department of State* (1942).

STATEMENT

Petitioners were jointly engaged in the construction of an Outlying Defense Base known as Fort Bell and Kindley Field in Bermuda, a British Crown Colony. Petitioners were so engaged under a cost-plus-a-fixed-fee contract with the Corps of Engineers, United States Army (R. 13-15). The construction work and the services of the employees here involved were performed exclusively in the area, called the Leased Area, held by the United States under ninety-nine-year lease from the British Government, pursuant to the Exchange of Notes between the two governments dated September 2, 1940, and the Agreement between the two governments signed at London, March 27, 1941, hereinafter more fully discussed. Suit was initiated against petitioners in the Supreme Court of New York by eleven employees engaged by petitioners to perform the duties of policemen and fire-patrolmen protecting original construction work in the Leased Area (R. 2-8). They sued claiming coverage under the provisions of the Fair Labor Standards Act of 1938 for overtime compensation, liquidated damages and attorneys' fees. *Id.*. Following removal of the case to the United States District Court for the Southern District of New York, petitioners denied the pertinent allegation of the complaint (R. 8-9), pleaded as a separate defense that the plaintiffs were not covered by the Act (R. 9), and

moved for summary judgment (R. 12). Various affidavits and depositions were filed by the parties on this motion (R. 13-58). The District Court granted summary judgment for the petitioners, holding that the Act "had no application to the employment of the plaintiffs in the Leased Areas of Bermuda," because none of those areas was a Territory or possession of the United States within the meaning of the Fair Labor Standards Act. The District Court noted that it was not contended that the area is a "Territory" of the United States, and rejected the contention that it is a "possession" (R. 59 *et seq.*). On appeal the United States Court of Appeals for the Second Circuit reversed (A. N. Hand, Clark and Frank, C. JJ.). It stated the question as follows: "The District Court ruled that none of the leased areas of Bermuda where the construction work of the defendants was being performed was a 'Territory or possession of the United States' within the meaning of the Act. Our question is therefore as to the correctness of this ruling and specifically whether or not the leased area is a 'possession' within the statutory meaning." (R. 66). The Court of Appeals held that it was and remanded the case to the District Court.

SPECIFICATION OF ERROR TO BE URGED

The Court of Appeals erred in holding that the naval and air base in Bermuda leased to the United States by the British Government under and in accordance with the terms of the Lease, the Exchange of Notes dated September 2, 1940, and the Agreement dated March 27, 1941, between the two governments, is a "possession of the United States" and, therefore, within the coverage of the Fair Labor Standards Act.

SUMMARY OF ARGUMENT

I. The Leased Area in the British Crown Colony of Bermuda is not a "Territory or possession of the United States", on each of the following grounds:

First, "Territory" and "possession" are obviously used as words of art rather than descriptions of interests in realty. The terms comprehend only those areas outside the continental United States which are under American sovereignty; e. g., Alaska, Hawaii, Guam, Samoa. Since sovereignty in the Leased Area is retained by His Majesty's Government, it is not a "Territory or possession of the United States" in the sense intended by Congress in this and other statutes. The Leased Area is rather an American military outpost in a British possession,—a place subject to the use, occupation and control of the United States for a limited military purpose.

Second, the authority of the United States in the Leased Areas, contrary to the view of the court below, is far more restricted than in any area known as a "Territory or possession of the United States." Analysis of the background of the negotiations, the Exchange of Notes, Agreement and Lease, shows that the United States annexed no territory, assumed no responsibility for civil administration of the Leased Areas, and was granted authority carefully restricted to the defense and military objectives of the undertaking. The limited powers and status granted fall far short of those enjoyed in our "Territories" and "possessions".

This is expressly recognized by all the executive agencies concerned with the problem. The Department of State has specifically advised this Court that the limitations on American authority under the arrangements are inconsistent with the concept of "posses-

sions" as applied to such areas as Guam, Samoa or the guano islands, among others cited in the opinion below. Nor has the President vested the administration of the Leased Areas in the Department of Interior or any other executive agency, as in the case of "possessions" or "Territories". Moreover, the Fair Labor Standards Act itself has not been administratively construed to cover the Leased Areas, and consequently the vast construction work already done on these bases was carried forward on the understanding the Act did not apply. The Wage-Hour Division of the Department of Labor did not include any military bases abroad in its official administrative interpretations of the term "Territory or possession" issued in 1938, and the Administrator persisted in excluding the Leased Areas or like bases in a "general statement on coverage" issued in 1947. In fact, the Solicitor General has filed a memorandum in support of the petition for certiorari, arguing that the judgment below is erroneous and should be reversed.

Third, in the three instances where legislative coverage of the Leased Areas was intended, Congress has expressly included such Areas, in addition to express coverage of Territories or possessions of the United States. This conforms to the understanding of the draftsmen of the Agreement that apart from matters specifically covered, Congress would subsequently determine whether particular statutory controls and regulations should be extended to the Leased Areas and whether such controls and regulations were within the authority granted. Against this uniform legislative pattern, it is most significant that Congress has not seen fit to extend coverage of the Fair Labor Standards Act to the Leased Areas in the seven years that have elapsed since the United States acquired such authority as it has over those Areas.

Fourth, Congressional authority over the Leased Areas, arising solely from the Agreement, Lease, and Exchange of Notes, differs significantly from and is far more limited than the authority exercised in enacting the Fair Labor Standards Act of 1938; namely, the legislative power over the sovereign domain of the United States. Congress was not acting in 1938 as a legislative body for the Leased Areas, nor has it yet addressed itself to the issues of international, military, and labor relations involved in a decision whether to extend the Act to those Areas. The Act may not properly be construed as covering Leased Areas, which are not embraced in the authority exercised. The contrary intent may not be imputed to Congress particularly where, as here, the Act did not even exhaust the authority exercised either over interstate commerce or the Territories and possessions of the United States.

Finally, we submit that any doubt should be resolved against construing the Leased Areas as a "Territory, or possession of the United States". The Act does not give those terms by definition or enumeration a meaning restricted to the purposes of this particular statute. The affirmance of the judgment below would have unanticipated and adverse implications regarding other military bases indistinguishable in principle from the Leased Areas. Notwithstanding variations in location, tenure and other details of our rights in American military bases throughout the world, the problems arising from their use, occupation and control are surprisingly similar. As the Department of State has advised this Court, privileges by international agreement regarding immigration, taxation, customs, post exchanges and the like are being or have been enjoyed by members of our armed forces or other government personnel in many

foreign lands without any suggestion, until the opinion below was rendered, that the foreign sovereign thereby surrendered its sovereignty or bargained away its possessions. Consequently a holding that the Leased Areas are "possessions" of the United States might well be detrimental to our relations with foreign countries in which military bases are now held or in which they might in future be sought. The decision to extend the Act to the Leased Areas, if valid under the Agreement, should be made only by Congress, with the benefit of consultations with the executive departments particularly concerned with our foreign relations, insular affairs, national defense and labor relations.

II. Respondent's Opposition to the petition for certiorari appears to abandon the ground of the decision below that the Leased Area is a "possession of the United States", and presents the wholly new argument that the Area is covered as "a place outside" any State, under the language of Section 3(b) which defines "commerce" to mean traffic or communication "from any State to any place outside thereof". This construction is untenable. The phrase in Section 3(b) merely embraces employees producing or shipping goods from any State (including any Territory or possession) to any place outside thereof, anywhere in the world. Respondents mis-read the phrase to embrace employees at the foreign destination point. Obviously the Act does not even cover American citizens so employed in foreign lands, any more than it covers employees doing original construction work in such lands.

The power of Congress to cover such employees, whether in Europe, Canada or the Leased Areas, is not in issue here. The Fair Labor Standards Act, unlike some other Congressional enactments, does not extend

to the furthest reaches of Federal authority, either over interstate or foreign commerce or the Territories or possessions of the United States.

ARGUMENT

I

THE LEASED AREA IN THE BRITISH CROWN COLONY OF BERMUDA IS NOT A "TERRITORY OR POSSESSION OF THE UNITED STATES".

A. THE TERMS "TERRITORY" AND "POSSESSION" OF THE UNITED STATES APPLY ONLY TO AREAS OVER WHICH THE UNITED STATES HAS SOVEREIGNTY, AND CONSEQUENTLY DO NOT EMBRACE THE LEASED AREAS.

The meaning and application of the phrase "Territory or possession of the United States" in statutes of the United States will not be found in dictionary definitions of terms used to describe mere title to real property, *cf. United States* v. *Fullard-Leo*, 331 U.S. 256, or governmental interests akin to that in military reservations on American soil. *Cf. United States* v. *Unzeuta*, 281 U. S. 138, 142; *Benson* v. *United States*, 146 U. S. 325; *Western Union Telegraph Co.* v. *Chiles*, 214 U. S. 274. Words such as "Territory," "possession" and "United States" are used by Congress in a political, constitutional or, at times, in an international sense. Their meaning and application must be drawn from executive, legislative and judicial usage and from the theory and conduct of American domestic and foreign affairs under the Constitution and the law of nations, interpreted in conformity with the decisions of this Court.

It is essential at the outset, therefore, to review the relationship between the United States and the various areas throughout the world long known as its "Territories" or "possessions," in order to know the Con-

gressional intent in using the terms in the statutes of the United States. As will be seen, the fundamental characteristic in each instance is American sovereignty.

Alaska was ceded to the United States by treaty with Russia, transferring "all the territory and dominion now possessed by his Majesty [the Emperor of Russia] on the continent of America and . . . adjacent islands . . : The eastern limit is the line of demarcation between the Russian and the British possessions in North America." 15 Stat. 539; see *Rassmussen* v. *United States*, 197 U. S. 516, 521-525. The Territory of Alaska was established by Act of Congress in 1912 (37 Stat. 512), and is classified as an "incorporated territory of the United States." *Information on the Territory of Alaska transmitted by the United States to the United Nations* (1947) p. 7.

The Hawaiian Islands were annexed by joint resolution of Congress with the consent of the Republic of Hawaii, "as a part of the Territory of the United States and subject to the sovereign dominion thereof." 30 Stat. 750. The Territory of Hawaii was established by Act of Congress in 1900 (31 Stat. 141); and is classified as an "incorporated organized territory of the United States." *Information on the Territory of Hawaii transmitted by the United States to the United Nations* (1947) p. 4.

American Samoa is classified as an "unorganized United States possession." *Information on American Samoa transmitted by the United States to the United Nations* (1947) p. 5. Germany and Great Britain renounced all their "rights and claims over and in respect to" Tutuila, Manua and other Eastern Samoan islands in favor of the United States as "sovereign power" (31 Stat. 1878, 1879), and the native chiefs likewise ceded "absolutely and without reserve

to the United States of America all rights of sovereignty" therein. 45 Stat. 1253. The cession was accepted, ratified and confirmed by Congress. *Id.*, amended by 46 Stat. 3, 48 U. S. C. § 1431a. By joint resolution, Congress extended "the sovereignty of the United States" over Swains Islands, and placed it under the jurisdiction of the administrative and judicial authorities of the government established in American Samoa by the President of the United States. 43 Stat. 1357, 48 U. S. C. § 1431.

Guano islands which are appropriately discovered and occupied, and found not within the "lawful jurisdiction" of any other government, may be proclaimed by the President to be "appertaining to the United States" (11 Stat. 119, 48 U. S. C. § 1411-1412), on the basis that sovereign "dominion of new territory may be acquired by discovery and occupation, as well as by cession or conquest." See *Jones* v. *United States*, 137 U. S. 202, 212; *Downes* v. *Bidwell*, 182 U. S. 244, 306-307; *United States* v. *Curtiss-Wright Export Corporation*, 299 U. S. 304, 318; 1 *Hyde, International Law* (1945 ed.) p. 346; 34 Op. Atty. Gen. 507 (1925); Orent and Reinsch, *Sovereignty Over Islands in the Pacific* (1941) 35 Am. J. Int. Law 443, 453-454, 461; 1 *Moore's Digest of International Law* (1906) pp. 558-580. Transportation of guano from such islands to the mainland is "regulated as in the coasting trade between different parts of the United States". 11 Stat. 120, 48 U. S. C. § 1416; see *Petrel Guano Co.* v. *Jarnette*, 25 Fed. 675, 676-677 (E. D. N. C.)[1]

[1] Compare the Pacific coral atolls of Canton and Enderbury, claimed by both the United States and Great Britain, which were placed under condominium or joint administration of the two countries in 1939. 53 Stat. 2219. The United States has also proposed international administration of Antarctica, to resolve conflicting claims of various nations based on discovery and other acts.

The Virgin Islands were ceded by the Kingdom of Denmark, which transferred all "territory, dominion and sovereignty" therein. 39 Stat. 1706. The islands "have the status of an organized but unincorporated territory of the United States." *Information on the Virgin Islands transmitted by the United States to the United Nations* (1947) p. 5.

Guam, the *Philippine Islands* (now independent) and *Puerto Rico*, formerly under Spanish sovereignty, were ceded to the United States by treaty, 30 Stat. 1754, 1755, and thereby "came under the complete and absolute sovereignty and dominion of the United States." See *The Diamond Rings*, 183 U. S. 176, 179. The Philippines, for example, although not "incorporated in" the United States, were held "under the sovereignty of the United States as a possession or dependency." See *Rassmussen* v. *United States*, 197 U. S. 516, 521. These islands "constituted a dependency, for they were not possessions merely, but possessions held by right of cession from Spain and over which the United States undoubtedly had supreme powers of legislation and government." See *Posadas* v. *National City Bank*, 296 U. S. 497, 502; *Cincinnati Soap Co.* v. *United States*, 301 U. S. 308, 314. And in *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652, this Court, in an opinion by Chief Justice Stone, said of all the areas ceded after the war with Spain:

> "That our dependencies, acquired by cession as the result of our war with Spain, are territories belonging to, but not a part of the Union of states under the Constitution, was long since established by a series of decisions in this Court beginning with *The Insular Tax Cases* in 1901; *De Lima* v. *Bidwell*, *supra*; *Dooley* v. *United States*, *supra*, 182

U. S. 222; *Downes* v. *Bidwell*, 182 U. S. 244; *Dooley* v. *United States*, 183 U. S. 151; and see also *Public Utility Commissioners* v. *Pinchausti & Co.*, 251 U. S. 401, 406-407; *Balzac* v. *Porto Rico*, *supra*. This status has ever since been maintained in the practical construction of the Constitution by all the agencies of our government in dealing with our insular possessions. It is no longer doubted that the United States may acquire territory by conquest or by treaty, and may govern it through the exercise of the power of Congress conferred by Section 3 of Article IV of the Constitution 'to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States'. *Dooley* v. *United States*, *supra*, 183 U. S. at 157; *Dorr* v. *United States*, 195 U. S. 138, 149; *Balzac* v. *Porto Rico*, *supra*, 305; *Cincinnati Soap Co.* v. *United States*, 301 U. S. 308, 323." 324 U. S. 652, 673-674.[2]

Mr. Justice Reed, while dissenting in part on another ground, said in the *Ecatt* case:

> "Lands are either within the sovereign power of the United States or are outside and beyond that power. When conquest ripens into cession, lands lose their foreign character and become a part of the territories of the victor. The United States has been content to leave its possessions with a large measure of self-government." 324 U. S. at 681-682.

[2] See also *Information on Guam transmitted by the United States to the United Nations* (1947) p. 5; *Information on Puerto Rico transmitted by the United States to the United Nations* (1947) pp. 4-7.

The Nationality Act of 1940 defines the terms "United States" and "outlying possessions" as follows, when used in that Act:

> "(d) The term 'United States' when used in a geographical sense means the continental United States, Alaska, Hawaii, Puerto Rico, and the Virgin Islands of the United States.
>
> "(e) The term 'outlying possessions' means all territory, other than as specified in subsection (d), over which the United States exercises rights of sovereignty, except the Canal Zone." (§ 101, 54 Stat. 1137, 8 U. S. C. § 501.)

Thus, although differences persist in the application of particular constitutional provisions to such insular areas not "incorporated in" the Union of States, depending upon the nature of the provision in question, the terms "possession," "insular possession" and "dependency" are used uniformly to describe their status when under the sovereignty of the United States.

The Panama Canal Zone, obtained by treaty with the Republic of Panama (33 Stat. 2234), is generally recognized as an anomalous case. Article 2 of the treaty ". . . grants to the United States in perpetuity the use, occupation, and control of a zone of land and land under water for the construction, maintenance, operation, sanitation, and protection of said canal." By Article 3, Panama "grants to the United States all the rights, power, and authority within the zone mentioned and described in article 2 of this agreement, . . . which the United States would possess and exercise if it were the sovereign of the territory within which said lands and waters are located, to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power, or authority." Other provisions of the treaty add to the grants named in these two articles further guaranties of exclusive rights of the United States in the construction and maintenance of this canal. It is hypercritical to contend that the title of the United

In line with this long-established principle, military bases abroad occupied by or available to American forces have not been deemed "possessions of the United States", but rather areas subject to the use, occupation and control of the United States for the particular military purpose. See 35 Op. Atty. Gen. 536, 540-541; *infra*, p. 49, n. 15. Sovereignty is regarded as "too important a matter" to pass with a lease. See Wilson, *Leased Territories* (1940) 34 Am. J. Int. Law p. 704.

States is imperfect, and that the territory described does not belong to this nation." *Wilson* v. *Shaw*, 204 U. S. 24, 33. See also 40 Op. Atty. Gen. No. 10 (April 16, 1941); 2 *Hackworth, Digest of International Law*, p. 172; Nationality Act of 1940, § 203(a), 54 Stat. 1138; *cf. Luckenbach S. S. Co.* v. *United States*, 280 U. S. 173.

The United States included the Canal Zone among the "non-self-governing territories" on which reports were filed in 1946 with the United Nations under Article 73(e) of the Charter. See *United Nations, Non-Self-Governing Territories, Summaries of Information Transmitted to the Secretary General during 1946* (UN publication 1947) p. 101. The Panamanian Delegation voiced objection in the General Assembly on November 14, 1946, arguing that sovereignty over the Canal Zone resides in the Republic of Panama. *The United States and Non-Self-Governing Territories* (GPO, 1947) p. 21, note 1. In view of this statement, the Department of State did not transmit such information in 1947 "pending clarification of this question with the Republic of Panama." The Department of State added: "It is recalled that the General Assembly during the Second Part of the First Session agreed not to attempt, for the time being, the task of establishing criteria for determining the territories which are non-self-governing territories within the meaning of Article 73(e) of the Charter. Therefore, the United States, as last year, is transmitting information on the basis of a purely pragmatic approach to this question and without prejudice as to the territories on which information will in future be sent." *Summary of Information transmitted by the Government of the United States of America* (UN Release A 320, 25 July 1947) p. 1. See also *United Nations, Non-Self Governing Territories, Summaries of Information Transmitted to the Secretary General during 1946* (UN publication 1947), pp. 134, 101-129.

Also excluded from the accepted understanding of the term "possession of the United States", are other areas likewise not ceded to the United States or otherwise under American sovereignty, such as the parts of Germany, Japan and Korea occupied by and hence temporarily in the possession of American armed forces, regardless of the indefinite duration of our occupation or the sweeping authority exercised under the war power. *Cf. The Diamond Rings*, 183 U. S. 176, 178; *Dooley* v. *United States*, 182 U. S. 222, 233-234; *Neely* v. *Henkel*, 180 U. S. 109, 119-120; *Fleming* v. *Page*, 9 How. 603, 614-618; *Republic Aviation Corp.* v. *Lowe*, 164 F. 2d 18, 20 (C. C. A. 2d) *cert. den.*, 333 U. S. 845; *Galban* v. *United States*, 40 Ct. Cl. 495, 507-509. This plainly follows from the principle that "conquest . . . becomes a mode of acquisition of territory—and hence a transfer of sovereignty—only if the conquered territory is effectively reduced to possession and annexed by the conquering state." 1 *Hackworth, Digest of International Law*, p. 427.[4]

By the same token, it has not been supposed that the United States acquired a "possession" when it assumed responsibility from the Security Council of the United Nations as "administering authority" of

[4] For example, Cuba under American occupation following its liberation from Spain was deemed a "foreign country or territory . . . occupied by or under the control of the United States", under an amendment to the extradition laws designed to cover that situation. See 31 Stat. 656; *Neely* v. *Henkel*, 180 U. S. 109, 119-120. A subsequent amendment extended the extradition statute to apply "in any country where the United States exercises extraterritorial jurisdiction for the arrest and removal therefrom to the United States, its Territories, Districts, or possessions, including the Panama Canal Zone and the Philippine Islands, or any other territory governed, occupied, or controlled by it". 48 Stat. 454, 18 U. S. C. § 662b.

the "Trust Territory of the Pacific," comprising the former Japanese mandated Marshall and Caroline Islands and the Marianas (except Guam). *The United States and Non-Self-Governing Territories* (1947) pp. 54-57; 59 Stat. 1033, 1048-1049; Public Law 204, 80th Cong., 1st Sess. The basis of American administration is "trusteeship rather than annexation". H. Doc. 378, 80th Cong., 1st Sess., p. 8. The authority granted does not imply American sovereignty over the trust territory. *Id.*, pp. 13, 16.

In contrast with the situations above described, it is manifest that as the Department of State has advised this Court, the arrangements under which the Leased Areas were obtained "did not and were not intended to transfer sovereignty over the leased areas from Great Britain to the United States" (Memorandum filed by the Solicitor General in support of the petition for certiorari, p. 8). Our interest in the Leased Areas arises solely from the bilateral agreement with His Majesty's Government which retains sovereignty, as will be shown more fully hereinafter, pp. 19-22, 33. It follows from the foregoing that the Leased Areas are not "Territories" or "possessions" of the United States.

The court below conceded that the Leased Areas involved no transfer of sovereignty, *Republic Aviation Corp.* v. *Lowe*, 164 F. 2d 18, 20 (C. C. A. 2d), L. Hand, Swan and Chase, JJ., *cert. den.*, 333 U. S. 845,[5] and there is no conflict on that question between His Majesty's Government and the United States. Nor is the

[5] "... as to those [bases] we got from Great Britain, it has not yet been established that there was any cession of territory which involved a transfer of sovereignty. Rather, there was a so-called lend lease [sic] transaction under which the United States became the lessee for a term."

opinion of the court below to the contrary. The court failed, however, to draw the necessary conclusion that the Leased Area is not a "Territory or possession." The court supported its failure so to do by the erroneous supposition that the Leased Areas are subject to "fully as complete control by the United States" as obtains in other areas long known as "possessions of the United States" (R. 68), citing the Philippine Islands, Guano Islands, Swains Island, American Samoa, and Guam.

In the first place, "sovereignty is never held in suspense," see *United States* v. *Curtiss-Wright Co.*, 299 U. S. 304, 317; *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347, 358, and in each of the instances cited by the court below, as we have already demonstrated, the United States is sovereign and therefore enjoys the unlimited powers of sovereignty. In all these instances, as well as the others analyzed above, pp. 10-14, there are no "diverse degrees of sovereignty" or condominium, as the court below mistakenly assumed (R. 68), but only varying degrees of local self-government granted by the United States *as sovereign*. Thus the United States was sovereign in the Philippine Islands until they became independent on July 4, 1946; only by this final act of independence did the islands cease to be a "possession" of the United States. 60 Stat. 1352; see *Hoover & Allison Co.* v. *Evatt*, 324 U. S. 652, 675-676; *Cincinnati Soap Co.* v. *United States*, 301 U. S. 308, 319.

In the second place, analysis of the historical background of the arrangements for the Leased Areas and of the documents underlying American rights therein, demonstrates that the United States does not enjoy "fully as complete control" over the Leased Areas as

in the possessions cited by the court below. We now turn to that analysis.

B. THE LEASED AREA IS MERELY A MILITARY OUTPOST ON BRITISH SOIL, AND THE AUTHORITY OF THE UNITED STATES THERE IN IS FAR MORE LIMITED THAN IN ANY AREA KNOWN AS A "TERRITORY OR POSSESSION OF THE UNITED STATES."

The international arrangements for naval and air bases in Bermuda are indistinguishable for present purposes from those made simultaneously for like bases in Newfoundland, St. Lucia, Antigua, Jamaica, Trinidad and British Guiana. Three basic international papers are involved in each instance,—the Exchange of Notes, the Lease and the Agreement. All the official pronouncements by the two governments and the principal actors in the arrangements, during and subsequent to the negotiations, negative any implication that a "Territory" or "possession" was being transferred by His Majesty's Government and acquired by the United States.

1. *Background of the negotiations*

The British Prime Minister, Rt. Hon. Winston Churchill, reported as follows to the House of Parliament on August 20, 1940:

> "President Roosevelt has recently made it clear that he would like to discuss with us, and with the Dominion of Canada and with Newfoundland, the development of American naval and air facilities in Newfoundland and in the West Indies. *There is, of course, no question of any transference of sovereignty—that has never been suggested*—or of any action being taken, without the consent or against the wishes of the various Colonies concerned, but for our part, His Majesty's Govern-

ment are entirely willing to accord defense facilities to the United States on a ninety-nine year leasehold basis, and we feel sure that our interest no less than theirs, and the interests of the Colonies themselves and of Canada and Newfoundland, will be served thereby". [Italics supplied.] 364 *Parliamentary Debates, House of Commons*, 1170-1171.[6]

Secretary of State Cordell Hull has recorded how and why the United States' objective in the transaction had changed from outright purchase of the areas to that of 99 year leaseholds:

"He [the President] also knew the penurious condition of the native populations of most of the islands, and consequently did not want to assume the burden of administering those populations. Therefore he had changed . . . from his original idea of outright purchase of the bases to that of ninety-nine year leases. I had originally favored outright cession, but was willing to

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[6] Viscount Halifax, then British Secretary of State for Foreign Affairs, also advised the House of Lords:

"*No question of any transference of sovereignty arises*, and the Governors of the territories in which concessions are being made, as also His Majesty's government in Canada, have been consulted at every stage and have fully concurred in what has been done. I think it is also true to say that from all the reports reaching me, the Agreement has been received with warm approval and cordiality by the peoples directly concerned. Certainly it is true that this Agreement stands in singular contrast to the more tortuous processes by which the totalitarian powers seek to enlarge their sphere of domination at the expense of others." [Italics supplied]. 117 *Parliamentary Debates, House of Lords* (Sept. 5, 1940), p. 367.

agree to leases instead". 1 *Hull, Memoirs* (1948) p. 834.

President Roosevelt's historic message to the Congress on September 3, 1940, making public the Exchange of Notes, stated only that the United States thereby "acquired the right to lease naval and air bases" at enumerated British Empire points in the Western Hemisphere. The President's message also transmitted an Opinion of the Attorney General upholding the President's authority to consummate the arrangement, and setting forth the following "essential characteristics" of the proposal:

> "The acquisition consists only of rights, which the United States may exercise or not at its option, and if exercised may abandon without consent. *The privilege of maintaining such bases is subject only to limitations necessary to reconcile United States use with the sovereignty retained by Great Britain. Our Government assumes no responsibility for civil administration of any territory.* It makes no promise to erect structures, or maintain forces at any point. It undertakes no defense of the possessions of any country. In short it acquires optional bases which may be developed as Congress appropriates funds therefor, but the United States does not assume any continuing or future obligation, commitment, or alliance" [italics supplied]. 39 Op. Atty. Gen. 484, 485; H. Doc. 943, 76th Cong. 3rd Sess., p. 5.

The essentially military purpose and character of the arrangements were uppermost in the negotiations

leading to the Agreement and Leases. See *Winant, Letters from Grosvenor Square* (1948) pp. 33-38. The Assistant Solicitor General, who had served as civilian representative on the United States Commission which negotiated the Agreement and Leases, stated to the Judiciary Committee of the House of Representatives that on the issue of sovereignty, the United States commissioners "never departed from the positions that the heads of the two governments had taken"; namely, that "sovereignty was not transferred". *Hearings on H.R. 5096*, 77th Cong. 1st Sess. (July 24, 1941), Tr. p. 25. He testified further:

> "We had several definite objectives. The first, I should say the principal one, was that the United States should have all the power *by agreement* in this document that was eventually signed, necessary to have complete control in the bases themselves, *primarily from the military standpoint, because they were a part of a defense scheme . . . We were not going down there for purposes other than in connection with defense.*
>
> "The second basic principle upon which our Government acted was that in doing so we should not be put to financial loss, other than the compensation agreed upon originally in the exchange of notes, through the imposition upon our personnel on the bases, either military or civilian, of customs, taxes and licenses, and things of that sort . . .
>
> "Now third, and equal if not of greater importance, was that . . . at a time when we were at war, we should not only have the rights given us by the agreements in ordinary times, to construct and maintain and keep up the bases, but that we

should do anything we wanted to *from a military stand point* in the whole of the Territory; and that eventuated in Article 2, which became known as the war article or the emergency article. . . .

"Now, we did not desire to approach the problem primarily from the standpoint of civil administration on the bases . . . Certain specific matters were raised in addition to those primary points that I have mentioned, which had to be settled because question was raised about them" [italics supplied]. *Id.*, pp. 22-23.

2. *The Exchange of Notes, Lease, and Agreement*

Lord Lothian's Note of September 2, 1940, expressed his Government's interest "in the national security of the United States" and their desire "to strengthen the ability of the United States to cooperate effectively with the other nations of the Americas in the defense of the Western Hemisphere". Accordingly His Majesty's Government "will secure the grant to the Government of the United States freely and without consideration, of the lease for immediate establishment and use of Naval and Air bases and facilities for entrance thereto and the operation and protection thereof". *Executive Agreement Series* 235, *Department of State* (1942), pp. 14-15. In replying on behalf of the United States, Mr. Hull referred to the generous actions of His Majesty's Government "which are destined to enhance the national security of the United States and greatly to strengthen its ability to cooperate effectively with the other nations of the Americas in the defense of the Western Hemisphere. It therefore gladly accepts the proposals". The note of Mr. Hull added that the United States "will immediately

transfer to His Majesty's Government fifty United States Navy Destroyers . . ." *Id.*, p. 15-16.

The Lease recites the undertaking of the Notes "to secure the grant to the United States of the lease of certain Naval and Air Bases and facilities"; and the United States "agrees that it will not during the term hereby granted use the Leased Area nor permit the use thereof except for the purposes specified". *Id.*, p. 20.

The preamble of the Agreement of March 27, 1941, incorporated in each Lease by reference, stresses the same fundamental approach of the two Governments. *Id.*, p. 1. When the detailed terms and conditions of the Agreement are read as they must be in the light of the declared purpose, each provision is entirely consistent with the limited military character of the rights acquired by the United States, and numerous provisions are inconsistent with and negate a grant of any other or broader character:

General authority. The United States is given "all the rights, power and authority within the Leased Areas which are necessary for the establishment, use, operation and defence thereof, or appropriate for their control"; and similar authority is granted within the limits of territorial waters and air spaces adjacent to or in the vicinity of the Leased Area. *Id.*, p. 1, Art. I. When the United States is at war, it may also exercise in the surrounding areas of the entire British Crown Colony, waters and air spaces all rights, power and authority necessary for conducting "any military operations deemed desirable by the United States". Art. II. These grants of general authority, though broad, are necessarily limited to the defense and military objectives of the arrangements. This is underscored by succeeding articles of the Agreement. For example:

Postal facilities may be established by the United States for the "exclusive use" of its forces or personnel, "for domestic use" between the Leased Area and the United States, the Panama Canal Zone and the Philippine Islands. *Id.*, p. 8, Art. XVI. An annex to the Agreement emphasized that the postal facilities must be "strictly limited to persons entitled under Article XVI to use them", and that any mail by unauthorized persons must be turned over to the Crown Colony authorities, for examination and censorship. *Id.*, pp. 41-42.

Business enterprises (except post exchanges), may not be established in the Leased Area, and no person may "habitually render any professional services" therein except to or for the Government of the United States or the American forces or personnel therein. *Id.*, p. 9, Art. XVIII.

Immigration laws of the Crown Colony are suspended only to admit American military forces or personnel in connection with the construction, maintenance, operation or defense of the Base, but the United States is responsible for providing passage out of the Crown Colony for any such person no longer entitled to admission. *Id.*, p. 7, Art. XIII.

Customs and other duties are lifted only for limited purposes and personnel, and the re-sale of goods so admitted is prohibited except through post exchanges to authorized persons. *Id.*, pp. 7-8, Art. XIV. In a subsequent understanding embodied in an exchange of notes effective February 21, 1946, the United States agreed to certain procedures regarding prevention of re-sale of goods admitted free of duty, and undertook to ensure that free importation be "strictly limited" to goods covered by the 1941 Agreement and subsequent correspondence. *Treaties and other Interna-*

tion Acts Series 1592, *Department of State* (1947).

Wireless stations may not be established or submarine cable landed, except with the consent of the Crown Colony. *Executive Agreement Series 235* (1942), p. 8, Art. XV.

Commercial aircraft may not operate from the Base, except for strictly military purposes. *Id.*, p. 6, Art. XI(5). By subsequent agreement between the United States and His Majesty's Government in the United Kingdom, dated February 24, 1948, Kindley Field, Bermuda, among other bases, was opened to commercial aviation under stipulated terms and conditions. *Treaties and other International Acts Series 1717, Department of State* (1948).

Minerals and antiquities are not included in the rights and privileges granted; and the United States agrees to permit the exercise of fishing privileges within the Leased Area "insofar as may be found compatible with military requirements". *Executive Agreement Series 235* (1942), p. 11, Art. XXV.

Jurisdiction vested in the United States is limited to offenses of a military nature or related to protecting the security and property of the Base. *Id.*, p. 3, Art. IV. Jurisdiction may also be exercised under military law. *Id.*

Laws of the Crown Colony are inoperative in the Leased Area only to the extent that they "derogate from or prejudice any of the rights conferred on the United States by the Lease, or by this Agreement". *Id.* p. 12, Art. XXIX. All such local laws thus remain in effect except as they are inconsistent with American rights under the arrangements, either granted in terms or validly exercised pursuant to Article I. For example, as to workmen's compensation rights and remedies, see *infra*, p. 38.

Modification of the Agreement may be made by consent after a reasonable time. *Id.*, p. 12, Art. XXVIII. The United States is not obliged to exercise any right, power or authority granted or to maintain forces in the Leased Area (*id.*, pp. 2-3, Art. III), but agrees not to "assign or underlet or part with the possession of the whole or any part of any Leased Area". *Id.*, p. 10, Art. XXIII. The United States may abandon any Leased Area or part thereof without obligation; and, on the expiration of due notice, the area abandoned "shall revert to the Lessor". *Id.*, p. 10, Art. XXI.

These limited powers granted the United States in the Leased Areas, and the limited status therein of the United States, fall far short of the powers and status enjoyed in areas known as "possessions of the United States", such as Guam, American Samoa, or the Virgin Islands. The bases here in question are merely military outposts on foreign soil, leased to the United States only for security and defense purposes for a limited period of time. No more was sought. No more should be held to have been granted or acquired. As stated in *Oppenheim's International Law* (6th ed. by Lauterpacht), the leases "did not involve, apart from a rigidly limited concession of certain jurisdictional rights, any surrender either of sovereignty or of the exercise thereof" (pp. 413-414).

The court below (R. 67-68) in considering the powers granted to the United States failed to take account of the general and the specific limitations of the arrangements which give them their character.[7] The combi-

[7] The court particularly misconceived the purpose of Article XI of the Agreement, whereby "it is understood that a Leased Area is not a part of the territory of the United States for the purpose of

nation of the general over-all limitations to the military purpose with the specific limitations respecting all matters not directly related to that purpose yet incidental to it, serves graphically to emphasize the special military character of the arrangements and to exclude any implication that a "Territory" or "possession" was being transferred by His Majesty's Government or acquired by the United States.

3. *Subsequent executive interpretation*

All Executive agencies of the United States which have any jurisdiction in the premises have repudiated respondents' interpretation of the arrangements as granting powers tantamount to the creation of a "Territory or possession" of the United States within the meaning and coverage of the Fair Labor Standards Act or any other statute of the United States.

(i) *Department of State.* In a letter annexed to the Memorandum filed by the Solicitor General on behalf of the United States, in support of the petition for certiorari herein, the Department of State exhaustively

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coastwise shipping laws so as to exclude British vessels from trade between the United States and the Leased Areas." *Id.*, p. 6, Art. XI (4). The other provisions already cited show that the United States was not free to deal with the Leased Area as if it were a Territory or possession of the United States. *Supra, pp. 25-27.* The specific exemption as to coastwise shipping laws was obviously phrased to negative the words of the statute which the parties themselves deemed inapplicable in any event. It evidences the natural desire of a great maritime nation to avoid any question that the authority granted the United States might be deemed to exclude British vessels from trade between the United States and the Leased Areas. No more meaning can properly be read into the specific exemption of coastwise shipping laws. In any event, the Area cannot be said to be a "possession" because the Agreement makes it clear that it is not "territory" of the United States.

analyzed the provisions of the Agreement and concluded:

> "Under Art. IV (1) the United States does not have 'the absolute right' of jurisdiction over the offenses enumerated therein but only the absolute right 'in the first instance' to assume and exercise jurisdiction with respect to such offenses. The jurisdiction over offenses conferred on the United States by Art. IV is a limited jurisdiction, and is not confined to the leased areas but in some aspects extends also to the whole Territory in which the base is situated. . .
>
> "The rights and privileges given to the U. S. by the Leased Bases Agreement of March 27, 1941, as well as the restrictions placed on the U. S. by the Agreement are regarded by the Department as the conditions of use and occupancy of the leased areas and do not seem to it to indicate that such areas are possessions of the United States. . . .
>
> " . . . The leased areas are to be held by the United States for the stated period for certain specified uses of a military nature, and the United States is not free to use them as if would its own property."

The Department of State "regards as unfortunate" the conclusion of the court below that the authority granted in the Leased Areas represents as complete control therein as in other areas long known as "possessions" of the United States:

> "The restrictions placed on use of the bases by the United States and the term of the lease are inconsistent with the conception of 'possessions' of the United States as applied to the areas mentioned in the Court's opinion."

On this understanding and interpretation, the Department of State did not include the Leased Areas when it submitted information on the "non-self-governing territories" under the administration of the United States to the Secretary General of the United Nations under Article 73(e) of the Charter, *Supra*, p. 15, n. 3.

Although the construction of domestic statutes and international agreements of the United States, like the construction of the Constitution itself, ultimately rests with this Court in cases or controversies appropriate to its jurisdiction, the foregoing interpretation of American authority over Leased Areas by the Department of State amounts to a *denial* of powers of sovereignty therein and is therefore entitled to the greatest weight, see *Pearcy* v. *Stranahan*, 205 U. S. 257, 272-274, on a par with the assertion by the executive of American sovereignty over other areas in the world. See *Jones* v. *United States*, 137 U. S. 202, 212. This Court has repeatedly ruled that "who is the sovereign of a territory is not a judicial question, but one the determination of which by the political departments conclusively binds the courts". *United States* v. *Belmont*, 301 U. S. 324, 328; *Oetjen* v. *Central Leather Co.*, 246 U. S. 297, 302; *Jones* v. *United States*, 137 U. S. 202, 212. See also, as to construction of international agreements or treaties, *Cameron Septic Tank Co.* v. *Knoxville*, 227 U. S. 39, 43; *Terrace* v. *Thompson*, 263 U. S. 197, 223-224; *Clark* v. *Deckenbach*, 274 U. S. 392, 395-396; *Jordan* v. *Tashiro*, 278 U. S. 123, 127; 5 *Hackworth, Digest of International Law*, pp. 259-260.

(ii) *Department of the Interior.* The Division of Territories and Island Possessions of the Department of the Interior has not been vested with administration of the Leased Areas, 5 U.S.C. § 433t, note, Reorg.

plan II, § 4(d); nor has the President vested such administration in any other Department as in the case of particular "Territories" or "possessions".

(iii) *The Wage-Hour Division, Department of Labor*, charged with the administration and enforcement of the Fair Labor Standards Act itself, has published interpretations which have been outstanding continuously from the inception of the Act to the present date. These interpretations have never included the Leased Areas or similar bases in the enumeration of "Territories and possessions" covered by the Act. Interpretative Bulletin No. 2, issued October 17, 1938, before the acquisition of the bases, reads as follows:

"Application of Act—Territories and Possessions"

> "In Section 3(c) 'State' is defined as meaning 'any State of the United States, or the District of Columbia, or any Territory or possession of the United States'. Therefore, employees within the District of Columbia, and the Territories and possessions (*Alaska, Hawaii, Puerto Rico, the Canal Zone, Guam, Guano Islands, Samoa, Virgin Islands*), are dealt with on the same basis as employees working in any of the forty-eight States". 3 *CCH Labor Law Reporter* (4th ed.) par. 24, 476, [Italics supplied.]

This interpretation has remained outstanding to the present day. *Id.*, par. 24,102.01. Although fully cognizant of the instant case and other litigation raising the question, the Administrator reiterated this identical interpretative language as recently as July 3, 1947, more than six years after the Leased Areas were negotiated, in a "General Statement on Coverage". *Id.*, 12 F. R. 4583, 4584, § 776.1(c). The Administrator

has not joined in or supported the respondents' contentions herein, but on the contrary the Solicitor General has filed a memorandum in support of the petition for certiorari, urging that the judgment below is erroneous and should be reversed.

Notwithstanding the great amount of construction work already performed by the Government at these naval and air bases, the Fair Labor Standards Act has not been administratively applied to them; and the work done has been carried forward on an assumption that the Act did not apply. This interpretation by the Administrator is entitled to great weight. See *United States* v. *American Trucking Association*, 310 U. S. 534, 549. "The Administrator's policies . . . determine the policy which will guide applications for enforcement by injunction on behalf of the Government. Good administration of the Act and good judicial administration alike require that the standards of public enforcement and those for determining private rights shall be at variance only where justified by very good reasons". *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140. Here, no reasons for variance appear, and considerations of national and international policy call for uniformity as between private rights and public enforcement.

4. Subsequent history of the arrangements

In 1944, a subcommittee of the House Committee on Naval Affairs suggested that the United States open negotiations looking to the permanent acquisition of the Leased Areas. *New York Times* (April 21, 1944) p. 8. Publication of this statement brought immediate reaction in Parliament. In reply to questions, Prime Minister Churchill assured the House that "there have

been no developments calling for a review by the Government or the House of the existing position in this matter, which remains unchanged". The following colloquy then ensued:

> "*Mr. G. Straus*: As the provisions of the Atlantic Charter provide that there should be no annexation without the consent of the population, do not the same provisions apply to British Dominion territories as well?
>
> *The Prime Minister*: There is not the slightest question of any cession of British territory—not the slightest". 399 *Parliamentary Debates, House of Commons* (April 26, 1944) p. 767.

The present position of the Department of State, as stated to this Court, does not depart in any respect from the understanding and objectives of the United States Government since 1940—that no more was acquired or is sought than a 99-year leasehold under and pursuant to the terms of the Agreement between the two Governments. The Agreement has been modified to grant landing rights for commercial aviation, but only by mutual consent according to its terms. *Supra*, p. 26. Otherwise the two Governments have been circumspect to adhere to its limitations, as in the case of suggested abuse of customs privileges by American personnel. *Supra*, p. 25.

5. *Congressional intent indicated by Section 17 of the Fair Labor Standards Act*

Our position is confirmed by internal evidence in the Fair Labor Standards Act itself. Section 17 vests jurisdiction to issue injunctions thereunder in

the District courts of the United States, and in "the United States courts of the Territories and possessions". But no civil courts of any kind have been established by Congress in the Leased Areas (R. 25), and the President has stated that "civil courts will not be established in leased areas beyond the territorial jurisdiction of the United States". S. Rep. 26, Committee on Naval Affairs, U. S. Senate, 78th Cong., 1st Sess. For this reason, legislation was enacted extending the jurisdiction of naval courts-martial to civilian employees of Government contractors on leased areas "without the territorial jurisdiction" of the United States and under the control of the Secretary of the Navy. *Infra* p. 40. In reporting a similar measure in the preceding Congress, Chairman Walsh of the Senate Committee on Naval Affairs stated that it "seeks to give jurisdiction to naval courts over civilians employed by our naval organization in areas where no civil courts are available". 88 Cong. Rec. 9481; see also S. Rep. 1811, 77th Cong. 2d Sess., p. 2.

In contrast to this policy as to leased defense bases, the jurisdiction of the United States District Court for the Territory of Hawaii was extended by the Act of August 13, 1940, to Midway, Wake, and other enumerated South Sea island possessions of the United States, because of the prospective increase in defense activities thereon. 54 Stat. 784; see S. Rep. 536, Committee on the Judiciary, U. S. Senate, 76th Cong. 1st Sess.

In view of the total absence of United States courts in the Leased Areas with jurisdiction to grant injunctive relief or otherwise, the bases cannot be com-

prehended or included in the concept of "Territory" or "possession" as used in Section 17 or Section 3(c) of the Act.[8]

C. IN EVERY INSTANCE WHERE LEGISLATIVE COVERAGE OF THE LEASED AREAS WAS INTENDED, CONGRESS HAS EXPRESSLY INCLUDED SUCH AREAS, IN ADDITION TO EXPRESS COVERAGE OF THE "TERRITORIES" AND "POSSESSIONS" OF THE UNITED STATES.

The Fair Labor Standards Act became law in 1938. The naval and air bases were not leased from the British Government until 1940-1941. The question is not whether Congress has the power to extend the coverage of the Act to the Leased Area for the duration of the Lease under the powers granted by the instru-

[8] Even if a court with jurisdiction to grant injunctive relief were ultimately established in the Leased Area under Article I of the Agreement, such action would not constitute the Leased Area a United States "possession," any more than the existence of the United States Court for China, under extra-territoriality treaty since abandoned (57 Stat. 767), thereby established American "possessions" in the "treaty areas" of that country. Powers of extradition, for example, are exercised by courts of the United States in countries where extra-territorial jurisdiction exists, apart from and in addition to courts in areas known as Territories or possessions of the United States. See 48 Stat. 454, 18 U. S. C. § 662b; 78 Cong. Rec. 4982-4983. See also the Act of April 29, 1948, Public Law 505, 80th Cong. 2d Sess., extending jurisdiction of the United States District Court, Territory of Hawaii, to Canton and Enderbury Islands, which provides that such extension "shall in no way be construed to be prejudicial to the claims of the United Kingdom to said islands in accordance with the agreement" of April 6, 1939 (53 Stat. 2219), providing for their joint administration. See H. Rep. 1701, 80th Cong., 2d Sess.

Establishment of a United States court in a Leased Area would presumably be based on the powers granted by the Agreement rather than on a general reservoir of sovereign authority, as over a "possession" of the United States.

ments involved; but whether the Act as enacted and as it now stands should be construed as applicable to that Area and to others indistinguishable from it. The question is not whether the United States under Article I of the Agreement has the authority, granted thereby in 1941, to extend wage-hour standards to some or all employment on some or all Leased Areas, but whether the Fair Labor Standards Act, written several years before the Lease was signed, is fully applicable to all such Areas—and this notwithstanding that in the seven years which have elapsed since Congress acquired whatever authority it has over the Leased Areas, Congress has not so extended that Act after ample opportunity to consider the varying factors incident to the Areas from an employment and international standpoint.

The considerations that entered into the drafting of the Agreement have already been described. *Supra*, pp. 22-23. As to the applicability of the mass of laws of the United States and of the British colonies not specifically mentioned in the Agreement, the intent of the draftsmen was expressed by the civilian member of the United States Commission, as follows:

> "With respect to laws in general, we did not feel, and I think properly so . . ., that we should attempt to make for Congress a code of laws applicable to the territory. It was not practicable; it would have meant a long drawn out and distressing negotiation which would probably still be going on in London, without any agreement ever having been reached, if we attempted to go through all the laws of each of the separate territories and substitute ourselves for the Congress of the United States and determine in detail what

code of laws should be applicable to the territories about everything that might arise in the next 99 years. . . .

". . . the method of handling the problem of what specific additional regulations should be made was left, under the general grant of authority made by the agreement, to the United States, with a provision which would protect us from interference with our rights in the proper operation of the Bases, by the provisions of Article XXIX, from any law of the territory which would derogate from or prejudice any of the rights conferred on the United States." *Hearings on H. R.* 5096, Committee on the Judiciary, House of Representatives, 77th Cong., 1st Sess. (July 24, 1941), Tr. pp. 27-28.

Thus, apart from the matters specifically covered in the Agreement and Lease, the arrangements for the Leased Areas left to further and future Congressional determination, in each individual instance, as to whether particular statutory controls and regulations should be extended to the Areas, and whether they were within the authority granted.

This approach was squarely embraced by Congress.

1. *Workmen's compensation*

The original Longshoremen's and Harbor Workers' Compensation Act, approved March 4, 1927, covered disability or death resulting from an injury "occurring upon the navigable waters of the United States". 44 Stat. 1424, 33 U. S. C. § 903. The term "United States" was defined to mean "the several States and Territories and the District of Columbia, including the Territorial waters thereof". 44 Stat. 1424, 33

U. S. C. § 902. Because of difficulties in the administration and settlement of personal injury claims by employees on the leased bases, amendatory legislation was introduced in 1941 (H. R. 5996, 77th Cong., 1st Sess.), at the request of Secretary of War Stimson. H. Rep. 1070, 77th Cong., 1st Sess., pp. 3-4. The House Committee on the Judiciary, which heard the testimony already mentioned, *supra* p. 36, quoted and relied on authority under Article I of the Agreement, and favorably reported the measure "in order to effectuate the policy of building, maintaining, and operating military, air, and naval bases acquired by the United States for the protection of this country". *Id.*, p. 7. The Report stressed the undesirable situation of "lack of uniformity and absence of adequate protection under local laws". *Id.*, pp. 4-5.[9]

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[9] The measure, known as the Defense Base Act, approved August 16, 1941, 55 Stat. 622, was amended by 56 Stat. 1028, 1035 (1942), to apply to the injury or death of any employee engaged in any employment—

"(1) at any military, air, or naval base acquired after January 1, 1940, by the United States from any foreign government; or

"(2) upon any lands occupied or used by the United States for military or naval purposes in any Territory or possession outside the continental United States (including Alaska; the Philippine Islands; the United States Naval Operating Base, Guantanamo Bay, Cuba; and the Canal Zone); or

"(3) upon any public work in any Territory or possession outside the continental United States (including Alaska; the Philippine Islands; the United States Naval Operating Base, Guantanamo Bay, Cuba; and the Canal Zone) . . .; or

"(4) under a contract entered into with the United States . . . to be performed outside the continental United States and at places not within the areas described in subparagraphs (1), (2), and (3) of this subdivision, for the purpose of engaging in public work . . ." 42 U. S. C. § 1651.

Congress thus utilized its authority under Article I of the Agreement to extend the coverage of the Longshoremen's and Harbor Workers' Compensation Act to employment on the Leased Areas, and did so in a context plainly excluding such bases from the concept of "Territory or possession outside the continental United States."

2. *War Damage Corporation*

The Reconstruction Finance Corporation created a war insurance corporation on December 13, 1941, protecting property in the continental United States against damage from enemy attack. 88 Cong. Rec. 965. Coverage was extended on December 22, 1941, to property in Alaska, Hawaii, the Philippine Islands, Puerto Rico, and the Virgin Islands. 88 Cong. Rec. 965. Thereafter, bills to confirm this action were introduced, providing that insurance protection be "limited to property situated in the United States, including the several States, the District of Columbia, Alaska, Hawaii, Puerto Rico, and the Virgin and Philippine Islands". H. R. 6382 and S. 2198, 77th Cong., 2d Sess. The Senate Committee on Banking and Currency (S. Rep. 1012, 77th Cong. 2d Sess.) substituted substantially the language in the public law, which covers property "situated in the United States (including the several States and the District of Columbia), the Philippine Islands, the Canal Zone, the Territories and possessions of the United States, and in such other places as may be determined by the President to be under the dominion and control of the United States" (56 Stat. 176).[19] Congressional comment makes clear that the

[19] The all-embracing language of the Committee amendment went beyond the suggestion of Senator Clark, a Committee member, to add the "Canal Zone and other United States possessions." Hear-

added phrase "in such other places" etc., embraced Army and Navy bases, occupied areas and the like,[11] in addition to and apart from the coverage of the "Territories and possessions" of the United States. The War Damage Act has not in fact been extended by Presidential action to the Leased Areas or any other American bases abroad. Its coverage has thus remained limited to the continental United States and the Territories and possessions.

3. Navy court-martial jurisdiction

The Act of March 22, 1943 extended the jurisdiction of naval courts-martial, in time of war or national emergency, to civilians serving with the Navy "within

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ings on S. 2198, Committee on Banking and Currency, 77th Cong., 2d Sess., p. 74. Senator Clark had in mind the particular bases of Pan-American Airways in the Canal Zone and on "islands which belong to us"; namely Wake Island, Midway Island, Guam and Canton. *Id.*, p. 10.

[11] "Of course, the word 'dominion' is a very, very elusive term. If, for example, we take over Asia Minor as part of the war control, that is under our dominion" (Senator Danaher, member of the Senate Committee on Banking and Currency, in *Hearings on S. 2198*, U. S. Senate, 77th Cong., 2d Sess., p. 104).

"This covers a great deal of territory, not only in the United States and possessions but in any territory we may secure control of anywhere, where we are putting our bases at the present time where we do not own them". (Congressman Gifford, member of the House Committee on Banking and Currency, in *Hearings on H. R. 6382 and S. 2198*, House of Representatives, 77th Cong., 2d Sess., p. 27).

"As I recall—and I can be corrected by my colleagues if I do not state it correctly—that referred to Navy bases and Army bases under the control and jurisdiction of the United States, wherein there may be private property connected with them" (Congressman Dewey, member of the House Committee on Banking and Currency, in House Debate. 88 Cong. Rec. 1851).

an area leased by the United States which is without the territorial jurisdiction thereof".[12] The Report by the Senate Committee on Naval Affairs pointed out that comparable jurisdiction existed for civilians accompanying the Army in the field,[13] and that the President had stated that civil courts will not be established in leased areas beyond the territorial jurisdiction of the United States. S. Rep. 26, 78th Cong., 1st Sess., p. 1.

Extension of such military jurisdiction is plainly

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[12] "In addition to the persons now subject to the Articles for the Government of the Navy, all persons, other than persons in military service of the United States, outside the continental limits of the United States accompanying or serving with the United States Navy, the Marine Corps, or the Coast Guard when serving as a part of the Navy, including but not limited to persons employed by the Government directly, or by contractors or subcontractors engaged in naval projects, and all persons, other than persons in the military service of the United States, within an area leased by the United States which is without the territorial jurisdiction thereof and which is under the control of the Secretary of the Navy, shall, in time of war or national emergency, be subject to the Articles for the Government of the Navy except insofar as these articles define offenses of such a nature that they can be committed only by naval personnel: *Provided*, That the jurisdiction herein conferred shall not extend to Alaska, the Canal Zone, the Hawaiian Islands, Puerto Rico, or the Virgin Islands, except the islands of Palmyra, Midway, Johnston, and that part of the Aleutian Islands west of longitude one hundred and seventy-two degrees west." 57 Stat. 41, 34 U. S. C. § 1201.

[13] The Articles of War governing the Armies of the United States apply to "all retainers to the camp and all persons accompanying or serving with the Armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the Armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles." 41 Stat. 787, 10 U. S. C. §1473 (d).

within the authority vested in the United States under Article IV of the Agreement.

4. Conclusion

The foregoing statutes form a pattern of Congressional interpretation that is entitled to the greatest weight in statutory construction. In each instance the legislative history or statutory text showed a clear intent to cover the Leased Areas; and in each instance, they were covered in terms clearly excluding them from denomination or consideration as "Territories" or "possessions" of the United States. This Congressional background is particularly significant since no Congressional acquiescence was obtained or sought on the basis that sovereignty or the authority of a sovereign power was being acquired over the Leased Areas. All official acts in the premises, executive as well as legislative, show that the United States contemplated and acquired only leaseholds for naval and air bases in British possessions, with the rights, powers and authority incident to their military purpose and within the terms of the Agreement.

D. CONGRESSIONAL AUTHORITY OVER THE LEASED AREAS ARISES FROM THE INTERNATIONAL AGREEMENT NEGOTIATED SUBSEQUENT TO ENACTMENT OF THE FAIR LABOR STANDARDS ACT, AND THAT ACT MAY NOT BE CONSTRUED TO COVER AREAS NOT EMBRACED IN THE SOVEREIGN LEGISLATIVE POWER THEN EXERCISED, PARTICULARLY SINCE THAT ACT DID NOT EVEN EXHAUST THE AUTHORITY THEN VESTED IN CONGRESS.

The limitations on American authority in the Leased Areas, already described (*supra* pp. 25-27), are not self-imposed by the United States. They are part of the very international arrangements under which the United States obtained whatever powers it does have in the Leased Areas. Those powers come from the

Agreement and Lease and can be exercised only thereunder and subject to the limitations imposed thereby. This is a far cry from the exercise of sovereign power over a possession or Territory, which belongs to the United States. Accordingly, the extension by Congress to the Leased Areas of any particular legislation must necessarily involve determination by Congress both of its authority under the international arrangements to make such extension and the policy considerations pertinent to such extension, as in the case of the workmen's compensation statute already referred to. *Supra*, pp. 37-38. The "constitution", as it were, of the Leased Area, is comprised of the Exchange of Notes, the Agreement and the Lease. Legislation must be enacted in the light of such "constitution" and any other factors appropriate for Congressional formulation of policy. This has not yet been done with respect to wage-hour standards.

In enacting the Fair Labor Standards Act, Congress was exercising its legislative power over the sovereign domain of the United States, not the more limited power residing in the United States by virtue of a particular international agreement. The power of the United States over the Leased Areas does not arise from sovereignty over them but from the terms of the international arrangements. The power thus far exercised by Congress in the Fair Labor Standards Act may not properly be construed as covering areas not embraced within the sovereign power exercised, nor can a contrary intention be imputed to Congress. This is particularly true where, as here, the statute did not even exhaust the Federal authority then vested in Congress, either over interstate commerce or the Territories and possessions. *Infra*, p. 58. The court below therefore erred in giving weight here to the precedents applying Congressional acts of general applica-

tion to the Territories or possessions though passed prior to the acquisition of the dependency there involved (R. 70).

The Fair Labor Standards Act of 1938 may not be construed to cover employment at the bases in Newfoundland, Bermuda, St. Lucia, Antigua, Jamaica, Trinidad and British Guiana. Congress was not acting in 1938 as a legislative body for those Areas. Should it determine to do so with respect to wage-hour standards, it would want to consider such questions as whether such legislation, if enacted for these places, should apply only to American employees or to employees indigenous to the place; and whether such legislation should apply to all or only to some of the Leased Areas. In determining these questions Congress would want to consider the prevailing wage rate, standard and cost of living, the effect on the British Colony as a whole of new wage-hour legislation for the Leased Area alone, and perhaps other questions of international relations or national defense.

We submit that the Leased Areas are not within the coverage of the Fair Labor Standards Act, and that they will not be covered unless and until Congress expressly so provides.

E. ANY DOUBTS SHOULD BE RESOLVED AGAINST CONSTRUING THE LEASED AREA AS A "TERRITORY OR POSSESSION" OF THE UNITED STATES.

In using the phrase "Territory or possession of the United States", Congress did not give it by definition or enumeration a meaning restricted to the purposes of this particular Act.[14] A holding that the Leased

[14] But cf. certain statutes regarding the Panama Canal Zone, set forth in *Luckenbach Steamship Co.* v. *United States*, 280 U. S. 173.

Area is a "Territory or possession of the United States" would bring into operation therein other statutes and powers of, and impose responsibilities upon the United States which Congress has not extended to nor intended to assume in these areas; e.g., as to citizenship or nationality of the inhabitants and of children born therein (Nationality Act of 1940, §§ 201, 202, 204, 54 Stat. 1138, 8 U. S. C. §§ 601, 602, 604); tariff duties (46 Stat. 590, 708, 19 U. S. C. §§ 1001, 1401 (k); mails and postage (45 Stat. 940, 1175, 39 U. S. C. §§ 283, 654); internal revenue (53 Stat. 79-81, 26 U. S. C. §§ 251, 252); passport issuance (44 Stat. 887, 22 U. S. C. § 211 (a)); and public health services (58 Stat. 683, 42 U. S. C. § 201 (g)), among other statutes of the United States. The implications of such a holding may not be limited to the confines of a particular statute, but bring to the bases all that the concept of a "Territory or possession of the United States" means under our Constitution and statutes and under the law of nations.

1. Other overseas bases of varying tenure, having conditions of use, occupation and control similar to the Leased Areas

The question has already arisen regarding the status and consequent coverage under the Fair Labor Standards Act of employees on military outposts in Greenland, Iran, Brazil and Canada (R. 72). Most courts passing on the issue concur in petitioners' view that such military bases are not covered by the Act. *Bernhard* v. *Metcalf Construction Co.*, 64 F. Supp. 953 (D. Neb.); *Burns* v. *Metcalf*, 69 F. Supp. 381 (W. D. Mo.); *Filardo* v. *Foley Bros.*, 181 Misc. 136 (Sup. Ct. N. Y.); *Greenstein* v. *Pan American Airways*, 185 Misc. 429 (Sup. Ct. N. Y.).

Examination of the conditions of use, occupation and control exercised by the United States in a number of these overseas bases discloses arrangements similar in many respects to those in the Leased Areas here involved. And in all such instances, as in the Leased Areas, sovereignty and the comprehensive powers of sovereignty are retained by the nation making available part of its territorial domain for purposes of American or international defense.

Among such overseas bases are the following:

(i) *Greenland.* By Agreement with Denmark dated April 9, 1941, the United States was authorized to construct, maintain and operate landing fields, seaplane facilities, radio and weather stations as may be necessary to prevent Greenland from being converted into a point of aggression against the Western Hemisphere. 2 *Hull, Memoirs* (1948) pp. 935-939; *Executive Agreement Series* 204, *Department of State* (1941), Arts. I and II. This includes the right to improve and deepen harbors, install aids to navigation by air and water, build roads, fortifications and other facilities, and to do "any and all things necessary to insure the efficient operation, maintenance and protection of such defense facilities as may be established." *Id.*, p. 3, Art. III. The United States may lease for the duration of the Agreement such areas of land and water as may be necessary for the construction, operation and protection of these defense facilities. *Id.*, p. 4, Art. V. The Kingdom of Denmark "retains sovereignty over the defense areas"; but for the duration of the Agreement, the United States has "exclusive jurisdiction" over such defense areas and military and civilian personnel of the United States and their families, as well as all other persons therein except Danish citizens and native Greenlanders. *Id.*, p. 6, Art. VI.

The United States may turn over to the Danish authorities in Greenland for trial and punishment, any person committing an offense in the defense area, "if the Government of the United States shall decide not to exercise jurisdiction in such case". *Id.* The United States may establish and maintain postal facilities and commissary stores to be used solely by military and civilian personnel of the United States and their families maintained in Greenland in connection with the defense establishment therein. *Id.*, p. 6, Art. VII. All materials, supplies and equipment for the construction, use and operation of the defense establishment and personal needs of military and civilian personnel of the United States and their families shall be permitted entry free of customs duties or other charges, and the American personnel are also exempt from all forms of taxes and levies. *Id.*, p. 6, Art. VIII. The United States "will respect all legitimate interests in Greenland as well as all the laws, regulations and customs pertaining to the native population and the internal administration of Greenland". *Id.*, p. 6, Art. IX. The Agreement shall remain in force "until it is agreed that the present dangers to the peace and security of the American continent have passed", at which time the modification or termination of the Agreement will be the subject of consultation between the two governments. Following such consultation, either party may terminate the Agreement on one year's notice. *Id.*, p. 7, Art. X. This Agreement is still in force.

(ii) *Guantanamo Naval Station.* The Act of March 2, 1901, providing for the recognition of Cuba, laid down among other conditions, "that to enable the United States to maintain the independence of Cuba, and to

protect the people thereof, as well as for its own defense, the government of Cuba will sell or lease to the United States lands necessary for coaling or naval stations at certain specified points, to be agreed upon with the President of the United States". 31 Stat. 895, 898. The principle was declared in the Constitution of Cuba, and in a treaty with the United States, 33 Stat. 2248, 2252. A *lease* "subject to terms to be agreed upon by the two governments", was concluded on February 16/23, 1903, providing that Cuba "hereby leases to the United States, for the time required for the purposes of coaling and naval stations", certain described areas of land and water. This includes the right to use and occupy adjacent waters, to improve the channel and anchorages, and "generally to do any and all things necessary to fit the premises *for use as coaling or naval stations only, and for no other purpose*". "While on the one hand the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the above described areas of land and water, on the other hand the Republic of Cuba consents that during the period of the occupation by the United States of said areas under the terms of this agreement the United States shall exercise complete jurisdiction and control over and within said areas . . ." 1 *Malloy, Treaties* (1910) pp. 358-359.

An Agreement between the two governments, dated July 2, 1903, declared their intention thereby "to conclude the conditions of the lease". *Id.*, pp. 360-361. The United States is to pay Cuba $2000 per year "as long as the former shall occupy and use said areas". Art. I. Cuba agreed to acquire title to all private lands in the area, with funds advanced by the United States and credited to the annual payments. *Id.* "No

person, partnership, or corporation shall be permitted to establish or maintain a commercial, industrial or other enterprise" in the areas. Art. III. The parties agreed to the delivery to each other of fugitives from justice charged with crimes amenable to Cuban or American law respectively who have taken refuge in their respective areas. Art. IV. No customs duties are to be levied on materials of any kind imported into the areas "for exclusive use and consumption therein". No such materials shall be transported from the areas "into Cuban territory". Art. V.

Under the 1934 treaty with Cuba, in furtherance of "good relations upon the enduring foundation of sovereign equality", all remaining authorization to intervene in Cuban affairs was terminated. Exec. Q, 73d Cong. 2d Sess. The treaty also provided for continuation of the Guantanamo lease agreement "until the two contracting parties agree to the modification or abrogation" thereof. See 48 Stat. 1682, 1683; 1 *Hyde, International Law* (1945 ed.) p. 63, n. 3.[15]

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[15] In 35 Op. Atty. Gen. 536, Attorney General Sargent ruled that goods of foreign origin brought into the area were not subject to tariff duties levied under the Tariff Act of 1922 "upon all articles when imported from any foreign country into the United States or into any of its possessions . . ." 42 Stat. 858, 19 U. S. C. §121. The Attorney General stated that the area was "not a 'possession' of the United States," as the word is used in the tariff laws, but only a "place subject to the use, occupation and control of the United States for a particular purpose," in view of "the nature of the station, as a mere governmental outpost beyond our borders, without inhabitants other than as indicated, closed to ordinary commerce, and into which no person or thing may enter without permission." *Id.*, pp. 540-541; see also 3 Hackworth, *Digest of International Law*, p. 9; 4 *id.*, p. 22; Wilson, *Leased Territories* (1940) 34 Am. J. Int. Law, pp. 703-704. The scope of authority granted the United States in Guantanamo is obviously

(iii) *Other overseas bases.* During World War II, American military bases spanned the globe. The bases throughout the Western Hemisphere—in Canada, Mexico, Panama, Ecuador, Peru and Brazil—particularly hastened the victory of our arms in both Europe and Asia. See 2 *Hull, Memoirs* (1948) pp. 1422-1423. At the present time, in addition to the bases above described, pp. 46-49, American bases or air maintenance depots are known to be located in Canada, England, Iceland and the Azores, as well as in the Trust Territory of the Pacific and in certain enemy-occupied countries

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far narrower than in the Canal Zone; and the authority granted in the Bermuda Base and other Leased Areas is narrower still.

The Guantanamo Naval Station or Operating Base was not included among the non-self-governing areas under United States administration, reported to the United Nations in 1946, *supra*, p. 15, n. 3, nor in the enumeration by the Administrator of the Wage-Hour Division of areas deemed "possessions," for purposes of coverage under the Act, in 1938 and in 1947. *Supra*, p. 31. So far as we are advised, the only reference to the Guantanamo base in the context of "possessions" appears in the Defense Base Act where it is listed with enumerated areas such as Alaska and the Philippine Islands. Such enumeration is in effect a particular definition of the term and is obviously limited to the purposes of the particular statute, as in the case of the Canal Zone in this and other instances. *Supra*, p. 44, n. 14. Its inclusion at this point was undoubtedly an incident of drafting this particular amendatory provision, since "at the time the legislation was drafted it was contemplated that its provisions would be made applicable only to the island bases acquired from Great Britain; however, the War and Navy Departments have requested the extension to *the other lands and possessions* for the reasons stated." H. Rep. 1070, Committee on the Judiciary, 77th Cong., 1st Sess., p. 5. [Italics supplied.] Moreover, the Defense Base Act applies to the Bermuda Base and other Leased Areas acquired since January 1, 1940, in a context plainly excluding them from any intended enumeration of "possessions" of the United States, for purposes of that statute or otherwise. *Supra*, p. 38, n. 9.

or colonies.[16] Moreover, the Charter of the United Nations contemplates the establishment of military bases on the territory of member nations.[17]

The foregoing sufficiently shows the world-wide distribution of our bases and the possible variations in duration of our rights therein. Notwithstanding such differences in location and tenure, the problems arising from their use, occupation and control are surprisingly similar, as shown by comparing the detailed arrangements already described. Provisions regarding immigration, customs, jurisdiction over offenses, tax exemption, post-exchanges, and the like run through the agreements for military bases, whether negotiated with Denmark and Cuba, Portugal or Great Britain. Such provisions manifest problems incident to military utility rather than sovereign dominion. Their inclusion in these agreements represents the best possible accommodation of the military objective of the arrangements with the sovereignty retained by the nations which made the areas available. As the Department of State has advised this Court, such provisions have been

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[16] *Executive Agreement Series 232, Department of State* (1942), *Treaties and Other International Acts Series 1566, Department of State* (1947) (Iceland); 14 *Department of State Bulletin* (1946), pp. 1080-1082, *Department of State Release #118* (February 13, 1948 (Azores); *New York Times* (January 15, 1948), p. 1 (Libya); *Department of the Air Force, Release #18* (August 25, 1948) (United Kingdom).

[17] By Article 43, "all Members . . . in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, . . . *facilities, including rights of passage*, necessary for the purpose of maintaining international peace and security." Such agreements shall be "subject to ratification by the signatory states in accordance with their respective constitutional processes". (Italics supplied.) 59 Stat. 1033, 1043.

or are being made for members of the armed forces or other government personnel in many foreign countries "without any suggestion that by the grant of such rights and privileges the foreign sovereign concerned has surrendered its sovereignty or bargained away its possessions".

We submit that any doubt should be resolved against a holding that the Leased Areas are "possessions" of the United States, in view of the widespread and unanticipated consequences of such a novel holding, as to many similar arrangements indistinguishable in principle.

2. Prejudicial effect of a holding that Leased Areas are "possessions of the United States".

The importance of military bases beyond our shores, and the delicate character of such arrangements from a military and diplomatic standpoint, require no elaboration. Referring to the military bases granted by Latin American countries during World War II, Secretary of State Cordell Hull stated:

> "When it is recalled that for many decades a number of the Latin American Republics feared armed intervention by the United States, their willingness to welcome armed forces of this country within their borders assumes added significance". 2 *Hull, Memoirs* (1948) pp. 1422-1423.

Particularly as to such bases, repeated assurances were given during the war to controvert enemy propaganda that we sought permanent footholds on Latin-American soil.[18]

[18] See statements of the Acting Secretary and the Secretary of State, *New York Times* (March 7, 1943) p. 27; *New York Times* (June 13, 1944) p. 14. The Government of Panama, which had

In the memorandum filed herein by the Solicitor General on behalf of the United States as *amicus curiae*, the Department of State has emphasized the adverse implications of a ruling that the Leased Areas are now or may be construed to be "Territories" or "possessions" of the United States:

> "Any holding that the bases obtained from the Government of Great Britain on 99-year leases are 'possessions' of the United States in a political sense would not in the Department's view be calculated to improve our relations with that Government. Moreover, such a holding might very well be detrimental to our relations with other foreign countries in which military bases are now held or in which they might in the future be sought."

3. Conclusion

In all the circumstances, it is submitted that any doubt as to the construction of the statute should be resolved against its application to Leased Areas on foreign soil, with corresponding connotations of American sovereignty. Such application should be made only by Congress, in the light of the situation existing at the time Congress acts, and with the benefit of consultations with the executive departments particularly concerned with our international relations, insular affairs, national defense, and labor relations. It is sub-

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made available to our forces 134 different areas for military installations to protect the Panama Canal during World War II, declined to ratify an agreement negotiated in 1947 for five-year leases of 13 defense sites and a ten-year lease of the Rio Hato air base. *Department of State*, Press releases December 10, 1947, December 23, 1947, and February 20, 1948; 18 *Department of State Bulletin* (1948) p. 317.

mitted that the Judiciary should be slow to decide that laws enacted without consideration of those factors should be applied to the Leased Areas under the guise of "Territories or possessions" of the United States. Peculiarly in this case, "to blur the distinctive functions of the legislative and judicial processes is not conducive to responsible legislation." See *Addison* v. *Holly Hills Fruit Products Co.*, 322 U. S. 607, 618.

II

The Leased Area in the British Crown Colony of Bermuda Is Not Otherwise Within the Coverage of the Fair Labor Standards Act

The petition for certiorari was addressed solely to the ground of decision of the court below; namely, that the Leased Area in Bermuda is a "possession" of the United States and consequently within the definition of "State" in Section 3(c) of the Fair Labor Standards Act. Respondents' opposition to the petition for certiorari, however, appears to abandon this position, and presents an entirely different argument which we assume will be pressed in this Court; namely, that the "controlling factor" in this case is not whether the Leased Area is a "possession" of the United States but whether it is a "place outside" any State within the meaning of Section 3(b), which defines the term "commerce" to mean "trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof." (Resp. Br. Opp. p. 6.) Respondents argue that Congress intended the phrase "place outside" to refer simply to any place "where federal controls exist"; and they appear to contend that this case involves covered employment in "commerce" from any "State" in the continental

United States from which construction materials were shipped, to a "place outside thereof," i. e. to the Leased Area. *Id.*, p. 5. This argument is wholly without substance.

Respondents and the court below (R. 72) appear to concede that the Fair Labor Standards Act is not applicable generally in foreign lands. This construction, consistently applied since the inception of the Act,[19] accords with the usual construction that even as to American citizens, "all legislation is *prima facie* territorial," *American Banana Company* v. *United Fruit Company*, 213 U. S. 347, 357, and that "the legislation of the Congress, unless the contrary intent appears, is construed to apply only within the territorial jurisdiction of the United States," *Blackmer* v. *United States*, 284 U. S. 421, 437, particularly where, as here, criminal penalties are involved. See also *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, 318; *United States* v. *Flores*, 289 U. S. 137, 155.

There can be no question that the Act covers employees who are engaged "in" or in the "production of goods for" commerce "from any State" (in the continental United States or any outlying Territory or

[19] The administrative interpretation is stated by the Administrator of the Wage and Hour Division in "*Official Answers to Questions*": "You are advised that the Act does not apply to work and employees working in foreign countries even though such employees are citizens of the United States. It is also my opinion that time spent by such employees in traveling from a point within the United States to the foreign destination need not be considered work covered by the Act, assuming, of course, that the employees perform no work of any kind for their employer while engaged in such traveling." *Wage and Hour Manual* (Cum. ed., 1944-1945) p. 118.

possession) "to any place outside thereof," *anywhere* in the world. §§ 2(b), 3(c), 15(a). That is to say, the Act applies to a factory worker in New York producing goods for shipment, or to a longshoreman on the New York docks loading such goods for shipment, "to" a Leased Area, "to" Puerto Rico or "to" London, England. This is the normal and natural meaning of the phrase "place outside thereof," as used in this and other statutes; e. g., Public Utility Holding Company Act of 1935, § 2(a) (28), 49 Stat. 804, 15 U. S. C. § 79b(a)(28). The word "place" is the broadest possible term that could be used; it is broader, for example, than the terms "foreign country" or "foreign nation," used in the Federal Trade Commission Act, § 4, 38 Stat. 730, 15 U. S. C. § 44, and the National Labor Relations Act, as amended, § 2(6), 49 Stat. 449, 29 U. S. C. § 152(6).

Respondents' construction reads the words "place outside thereof" to embrace coverage of employees at the destination point outside the United States. This reading leads to the absurd result that the Act covers generally longshoremen unloading on the docks at London, England, goods shipped from the United States, or unloading at any other "place outside" the seaboard State from which the goods originated. Respondents withdraw from this construction to the extent of adding the qualification, "any place outside thereof where federal controls exist." This reads into the language of the statute words which Congress did not place there. *Cf. Hilton* v. *Sullivan*, 334 U. S. 323, 339; *Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U. S. 607, 617-618. Moreover, respondents' interpretation would mean that employment in a seaboard State on goods destined for shipment outside the continental United States would be covered or not depending on

whether the destination "place outside thereof" was under "federal control." Thus the Act would be misread to cover employees within a seaboard State producing or moving goods destined for a Leased Area but not for the British Isles.[20]

The Court is not here presented with the issue whether Congress has power to regulate the wages and hours of employees in the Leased Areas, or of American citizens [21] or foreign nationals working anywhere in the world, on public works of the United States or otherwise. Such issues of constitutional power do not arise since the statute purports to cover only employment of employees engaged in or producing goods for commerce among the several States (including the District of Columbia, and the Territories and possessions of the United States), or *from* any State to any place outside thereof.

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[20] The instant case does not involve coverage of employment related to goods shipped from a place abroad to the continental United States for consumption in the seaboard State of destination. It should be observed that unlike other statutes embracing commerce "*between*" any State and any place outside thereof, the Fair Labor Standards Act embraces only commerce "*from*" any State to any place outside thereof. The Act has been administratively construed not to cover the employees of American importers working in the State of importation, provided that the goods are consumed only within that State and do not thereafter cross the State line either in original package or otherwise. See "*Official Answers to Questions,*" issued by the Administrator of the Wage Hour Division, in *Wage and Hour Manual* (Cum. ed. 1944-1945) p. 116. Likewise, employees of importers handling goods in the United States which were produced in Mexico under substandard conditions, are not in violation of the "hot goods" section of the Act, §15(a)(1), since Mexico is not a "State" within the statutory definition of Section 3(c). *Id.*, p. 116.

[21] The record is devoid of allegation or proof that any of the respondents is an American citizen, although many doubtless are.

Our position against coverage of employment in the Leased Areas is reenforced by the fact that "in the Fair Labor Standards Act, Congress did not intend that the regulation of hours and wages should extend to the furthest reaches of federal authority." *McLeod v. Threlkeld*, 319 U. S. 491, 493. "In enacting this statute Congress did not see fit, as it did in other regulatory measures, e. g. the Interstate Commerce Act and the National Labor Relations Act, to exhaust its constitutional power over commerce". *10 E. 40 St. Co. v. Callus*, 325 U. S. 578, 579; *Kirschbaum Co. v. Walling*, 316 U. S. 517, 521-523; *Walling v. Jacksonville Paper Co.*, 317 U. S. 564, 569-571. See also *Morris v. McComb*, 332 U. S. 422; *Levinson v. Spector Motor Co.*, 330 U. S. 649; *Western Union Co. v. Lenroot*, 323 U. S. 490; *Higgins v. Cary Bros. Co.*, 317 U. S. 572. Nor does the Act exhaust the plenary power of Congress within enumerated places under United States sovereignty. Instead of embracing purely local commerce in the District of Columbia, and in the Territories and possessions of the United States, the Act covers employment in these places on the same basis as employment in the 48 States. See *Interpretative Bulletin No. 2*, quoted *supra*, p. 31. The Philippine Islands were excluded altogether because not expressly enumerated. 39 Stat. 547, 48 U. S. C. § 1003. Special provision has been made as to minimum wages and homework in the Virgin Islands and Puerto Rico. 54 Stat. 615, 616, 29 U. S. C. § 205(e), 206(5).

With the statute so restricted, respondents' attempted construction to cover Leased Areas around the world is wholly untenable.

CONCLUSION

It is respectfully submitted that, for the reasons set forth above, the judgment of the court below should be reversed.

CHARLES FAHY,
JOSEPH MARKLE,
FRANKLIN NEVIUS,
J. RANDALL CREEL,
PHILIP LEVY,
Attorneys for Petitioners.

EIDLITZ, FRENCH, FINK & MARKLE,
Of counsel.

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